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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1037

STAR CHOPPER COMPANY, INC.,
PETITIONER,

v.

PAULA H. ROY,
ADVANCED MATERIALS SYSTEMS, INC.,
AND ASHOK HINGORANY,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner, Star Chopper Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit. The trial in the United States District Court for the District of Rhode Island resulted in a judgment for the plaintiff, Paula H. Roy, and the issuance of an execution in the amount of $531,008.52.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, which affirmed the judgment of the District Court, is not yet reported, and appears in the Appendix hereto, *infra*, pp. 1a-21a.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on October 3, 1978 (App. 22a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Is it error to disband a jury after their verdict is reported, when, during the polling of the jury, a juror indicates dissent; requests assistance, but is refused, and the record reveals that the juror was coerced in the jury room?

II. Is it a violation of due process to subject a manufacturer to the forum law of strict liability and simultaneously to deny the manufacturer the forum law requiring contribution or indemnity from the third-party defendant?

Constitutional Provisions Involved.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

The plaintiff, Paula H. Roy, is a Massachusetts citizen. She was injured in Massachusetts while in the course of her employment with third-party defendant, Advanced Materials Systems, Inc., a Rhode Island corporation. Defendant and third-party plaintiff, Star Chopper Company, Inc., is also a Rhode Island corporation. Third-party defendant, Ashok

Hingorany, is an employee of the other third-party defendant, Advanced Materials Systems, Inc., and a fellow-employee of plaintiff, Paula H. Roy. Ashok Hingorany is also a resident of Massachusetts, the state where the injury occurred.

The third-party complaint against Ashok Hingorany never went to the jury. The trial judge granted summary judgment for the defendant Ashok Hingorany on Star Chopper Company, Inc.'s, claim for contribution and directed a verdict at the close of all of the evidence on the third-party defendant's claim for indemnity against Ashok Hingorany.

Rhode Island has adopted the law of strict liability in tort. *Ritter* v. *Narragansett Electric Co.*, 109 R.I. 176, 283 A. 2d 255 (1971). Massachusetts has never adopted that doctrine although it has been before the Supreme Judicial Court of Massachusetts on several occasions. *Coyne* v. *John S. Tilley Co., Inc.*, 368 Mass. 230, 331 N.E. 2d 541 (1975); *Tibbetts* v. *Ford Motor Co.*, Mass. App. Ct. Adv. Sh. (1976) 1285, 358 N.E. 2d 460. The Massachusetts legislature has similarly refused to enact strict liability legislatively.

The court below applied Rhode Island law to the case in chief, Paula H. Roy v. Star Chopper Company, Inc. The trial court applied Massachusetts law to the third-party cases of Star Chopper Company, Inc., against Advanced Materials Systems, Inc., and Ashok Hingorany.

The jury never reported a unanimous verdict in that one of the jurors was required by the court to respond to how she voted in the jury room and not what her true verdict was at the time she was being polled.

This petition is also directed to the denial by the trial judge of Star Chopper Company, Inc.'s, admitted right to contribution from a fellow-employee of the plaintiff under the law of the case in chief. This right was summarily denied your petitioner by the refusal of the courts below to apply the law of the case in chief to the third-party action. The conduct of the

courts below deprived the third-party plaintiff of its legal right to contribution without due process of law.

Reasons for Granting the Writ.

I. Is it Error to Disband a Jury After their Verdict is Reported, When, During the Polling of the Jury, a Juror Indicates Dissent; Requests Assistance, but is Refused, and the Record Reveals that the Juror was Coerced in the Jury Room?

This is not a case of a juror impeaching her own verdict. The Circuit Court erred in treating this issue as if it were an attempt through a juror to impeach the juror's own verdict. The issue here is whether a juror, who may have agreed to a verdict in the jury room, has the right to dissent from the verdict when she is being polled in open court.

Before the jury was discharged, one of the jurors clearly was not yet ready to report her final verdict. The trial record discloses the following:

"THURSDAY, OCTOBER 6, 1977

"(Jury returned with verdict at ten p.m.)

"(During the polling of the jury, the following colloquy transpired with regard to juror Carnevale:)

"The Clerk: Mrs. Carnevale —

"Juror Carnevale: Could I ask, I need help, I think. I'd like to ask someone a question. I don't know who to ask.

"THE COURT: That's not the point, Madam; the point is this is your verdict sheet. The question is *when you voted*, 'Do you find for Star Chopper Company, Inc. or Advanced Materials Systems, Inc.?' all right —

"JUROR CARNEVALE: Advanced Materials Systems." (Emphasis added.)

The next morning, when no attorney or other individual had approached Juror Carnevale, the trial judge on his own summoned Juror Carnevale to the court and without counsel present interrogated her. The complete account of that interrogation appears herein at App. 23a-27a. A part of that interrogation is recorded as follows (App. 23a, 24a-25a,

"FRIDAY, OCTOBER 7, 1977

. . . . . .

"THE COURT: . . . It has come to my attention that you were emotionally upset last night and that a statement was made to me that you had stated that you were coerced in voting in favor of Advanced Materials Systems.

. . . . . .

". . . so tell me; what is it that you want to say to me — that does not reflect your true vote, is that what you want to say?

"MRS. CARNEVALE: Yes, sir, I feel that it wasn't what I felt, what I believe in. It wasn't right. We argued about it for a long time. I was the only one who felt that way. There were five who didn't and then they talked, they talked me into it. They made me understand that's the law, it isn't how you feel, it's the law that counts.

. . . . . .

". . . And I felt, well, they are right and that's why I voted. *When I sat in that jury last night* I was not ashamed, *but I felt I did wrong by saying that Star Chopper was wrong.* This is what I believe in, I still believe in and I will always believe in. I went home unhappy.

. . . . . .

". . . I feel that Mr. Hingorany and AMS was the [*sic*] blame." (Emphasis added.)

No claim is made here that the trial judge should have interrogated the witness as to the reasons behind her verdict. The trial judge should have permitted the juror to state why she needed help before reporting her final verdict. The trial judge should have ascertained for a certainty, before the jury was disbanded, that the juror had not been coerced and that no one had induced the juror to sign a verdict sheet to which she did not truly assent. By waiting until the next day to hear the juror, the court deprived this petitioner of the unanimous verdict to which it is entitled.

The object of polling the jury "is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries* v. *District of Columbia*, 174 U.S. 190, 194 (1899). After the jury has been discharged, it cannot be reconvened and hence cannot be polled after discharge. *Mattice* v. *Maryland Casualty Co.*, 5 F. 2d 233, 234 (W.D. Wash. 1925). If the responses of the individual jurors are not in complete agreement, the jury should be required to retire and further consider the case. If it appears that a juror dissents, it is the *duty* of the court to interrogate for the purpose of ascertaining the juror's *true* position. If is improper to allow counsel to interpose. See 5A Moore, *Federal Practice*,

¶ 49.07, page 2239 (1977), and *Bruce* v. *Chestnut Farms-Chevy Chase Dairy*, 126 F. 2d 224 (D.C. Cir. 1942).

If Juror Carnevale's statement, as fully revealed in App. 23a-27a, had been transmitted to the trial judge while the jury was still in the box and before it had been disbanded, the trial judge would have been compelled to send the jury back for further deliberation. That it was not fully revealed to the trial judge until the morning after the jury returned its verdict was solely because of error on the part of the trial judge. The record is clear that, before the juror reported her verdict and during her individual polling, she had a problem with regard to the verdict. She needed and wanted help. It was the clear duty of the court to answer whatever question the juror had at that time. This would have required the trial judge to send the matter back for further deliberation until it was clear that each juror had arrived at his own verdict and that the verdict was unanimous.

A juror has the unquestioned right, when polled, to dissent from a verdict to which she has agreed in the jury room. The trial judge inquired as to how the juror had voted *in the jury room*. The trial judge should have ascertained, that in open court, in the presence of the trial judge and free from any influence by her fellow jurors, she *still* wished her vote recorded as set forth in the verdict sheet. Under its supervisory powers, this Court should make it clear to both the trial court and the Circuit Court of Appeals that, during the polling, a juror who feels that pressure has been exerted on her by other jurors in the jury room is free in the open court room and before the trial judge to declare what her verdict truly is and not merely what the verdict sheet indicates.

Your petitioner was entitled, during the polling of the jury, to have the individual verdict of each juror in open court. Your petitioner was entitled to a unanimous verdict of the jury of six. Both of these rights were violated.

Equally important, the juror, Mrs. Carnevale, was deprived of her right to render her own deliberate, conscientious and intelligent verdict.

II. Is it a Violation of Due Process to Subject a Manufacturer to the Forum Law of Strict Liability and Simultaneously to Deny the Manufacturer the Forum Law Requiring Contribution or Indemnity from the Third-Party Defendant?

Under Rhode Island law, a fellow-employee, such as Ashok Hingorany, has no immunity from suit for employment related injuries. *Colarusso* v. *Mills*, 99 R.I. 409, 418, 208 A. 2d 381, 386 (1965). Only the employer is immune from suit for contribution. (Rhode Island law does not prohibit a suit for indemnity against an employer.) Under Massachusetts law, both the employer and the employee are immune from suit for contribution.

Under Rhode Island law, Star Chopper Company, Inc., has a right to equitable indemnity as Rhode Island bases its law of indemnity upon equitable considerations. Also, Rhode Island law allows Star Chopper Company, Inc., a recovery over against a third-party defendant if the fault of the indemnitee is passive and the fault of the indemnitor is active. *Helgerson* v. *Mammoth Mart*, 114 R.I. 438, 441, 335 A. 2d 339, 341 (1975); *Perry* v. *St. Jean*, 100 R.I. 622, 218 A. 2d 484 (1966). Under Massachusetts law, only contractual indemnity is permitted. *Liberty Mutual Ins. Co.* v. *Westerlind*, Mass. Adv. Sh. (1978) 526, 529, 373 N.E. 2d 957, 959. One passively responsible is not entitled to indemnity against one actively responsible, according to the law of Massachusetts, unless the responsibility is vicarious. The trial court in granting summary judgment had to accept as true that Ashok Hingorany contributed to the

plaintiff's injury and, therefore, was liable to Star Chopper Company, Inc., under Rhode Island law for contribution. That is, third-party plaintiff, Star Chopper Company, Inc., was absolutely entitled to contribution from Ashok Hingorany under the law of the case in chief. The court took that right away from Star Chopper Company, Inc., by switching from the forum law (Rhode Island), which imposed liability on Star Chopper Company, Inc., to the place of wrong (Massachusetts) law of immunity of a fellow-employee. If the court had applied Massachusetts law to the case in chief there would have been no liability to the plaintiff, Paula H. Roy, on the part of Star Chopper Company, Inc., as Massachusetts does not recognize strict liability and there was no finding by the jury that the defendant was negligent or that it had breached a warranty running to the plaintiff. In order to hold the defendant liable, Rhode Island's law of strict liability had to be and was applied. If the defendant is liable under Rhode Island law, it is a matter of law entitled to contribution under Rhode Island law. The rights and liabilities of parties can be determined by the local law of the state which has the most significant relationship to the occurrence and to the parties. Conceding that there are sufficient contacts with both Massachusetts and Rhode Island to make the application of either state's law constitutionally permissible, it is respectfully submitted that, when the law of both states is applied, the due process clause of the Fifth and Fourteenth Amendments must be construed to prohibit the simultaneous application of the inconsistent laws of two jurisdictions to a single lawsuit. The application of Rhode Island law to the case in chief to impose liability and the application of Massachusetts law to the third-party action under the same facts takes away from the defendant and third-party plaintiff the equal protection to which it is entitled under the law. If the due process and conflicts of laws guidelines require the application of Rhode Island law to the

case in chief, those same guidelines require the application of Rhode Island law to the third-party action. This is not merely the forum law, it is required by the Constitution. Nothing in the case of *Busby* v. *Perini Corp.*, 110 R.I. 49, 290 A. 2d 210 (1972), which was relied on by the trial judge and the Circuit Court, supports their position.

Conclusion.

The writ of certiorari should be granted, as fundamental rights relating to jurors are involved. This Court should establish clear guidelines as to the scope of the trial court's power in the choice of law by the trial court. This is particularly true in view of the ever-increasing number of products cases with parties, including third-parties, from various states with conflicting rules of law.

Respectfully submitted,

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Appendix.

United States Court of Appeals
For the First Circuit

No. 77-1567

PAULA H. ROY,
PLAINTIFF-APPELLEE

v.

STAR CHOPPER COMPANY, INC.,
DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT,

v.

ASHOK HINGORANY AND
ADVANCED MATERIALS SYSTEMS, INC.,
THIRD-PARTY DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Raymond A. LaFazia, with whom *Gunning, LaFazia & Gnys, Inc.*, and *George E. Healy, Jr.*, were on brief, for Third Party Plaintiff-Appellant, Star Chopper Company, Inc.

Harry W. Asquith, with whom *Edward W. Moses*, and *Swan, Jenckes, Asquith & Davis*, were on brief, for Third Party Defendant, Appellee.

Leonard Decof, with whom *Martin W. Aisenberg* and *Elizabeth D. Rode* were on brief, for Plaintiff, Appellee, Paula H. Roy.

October 3, 1978

BOWNES, *Circuit Judge*. Paula H. Roy, plaintiff-appellee, then a seventeen year old girl, received severe injuries to her hand while inspecting electroplating finished work at Advanced Materials Systems, Inc. (AMS), third-party

defendant. The machine which caused the injury, a take-up unit which had two motor-driven pinch rolls and a spool at the opposite end, was manufactured by defendant-appellant, Star Chopper Company, Inc., to specifications provided by AMS. The machine was designed to allow continuous electroplating, at a constant speed, of aluminum and other metal. AMS, through its then Vice President Hingorany, contacted one Michael Cabassa to design a machine capable of performing the desired functions. Cabassa did the engineering drawings for the job, which included pinch rollers, and recommended that Star Chopper manufacture the machine. A draftsman from Star Chopper prepared more detailed drawings. No safety guards were provided in the drawings nor discussed by anyone. There was no warning on the machine of the dangers presented by the pinch rollers.

Plaintiff's hand required eleven operations; extensive surgical repair was performed to attempt to reconstruct the hand. Even following surgery, her hand retains only 5% of its functioning ability and is severely deformed. Plaintiff received benefits under the Massachusetts Workmen's Compensation Act for her injury. She brought suit against defendant manufacturer, Star Chopper, originally on three counts: negligence, warranty, and strict liability. She dropped the negligence count prior to the charge to the jury and dropped the warranty count after the jury returned a verdict in her favor of $348,000 based on strict liability.

Defendant brought a third-party action against Advanced Materials Systems, Inc., and its president, Ashok Hingorany for contribution and indemnity. The court dismissed the count for contribution and noncontractual indemnity; the jury found against Star Chopper on the implied indemnity count. Star Chopper now brings this appeal, asserting sundry errors by the district court.

CONFLICTS QUESTION

Star Chopper complains of the court's choice of law rulings, both in the case in chief and in the third-party complaint. Under the rule enunciated in *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487, 496 (1941), a federal court, sitting in diversity cases, must follow the conflict of laws rules of the state in which it sits. The Rhode Island Supreme Court articulated the conflicts rules which should apply to this case in *Woodward* v. *Stewart*, 104 R.I. 290, 243 A.2d 917, *cert. dismissed*, 393 U.S. 957 (1968). That case suggested that Rhode Island's choice of law rules reflect the modern trend toward a textured, flexible approach; it set out five guidelines for helping to determine which state's law should apply. They are:

"(1) Predictability of results.
(2) Maintenance of interstate and international order.
(3) Simplification of the judicial task.
(4) Advancement of the forum's governmental interests.
(5) Application of the better rule of law."

Id. at 923. Prior to applying these guidelines, the court must first determine (a) whether there are sufficient contacts with each of the states so as to make application of either state's law constitutionally permissible, and (b) what the nature of the conflict between the laws of those states is. *Id.* at 921 & 923; *Tiernan* v. *Westext Transport, Inc.*, 295 F. Supp. 1256, 1263 (D.R.I. 1969).

Case In Chief

The district court concluded that, since Massachusetts was the site of the injury and the residence of the plaintiff and since Rhode Island was the state of incorporation of the defendant manufacturer, its place of business and the locus of the alleged tortious conduct, sufficient minimum

contacts existed for constitutional application of either state's law. The court then analyzed each state's laws relating to the principal action and found that a true conflict existed. Rhode Island applies strict liability, *Ritter* v. *Narragansett Electric Co.*, 109 R.I. 176, 283 A.2d 255, 261 (1971), whereas Massachusetts has not yet clearly adopted it. *Coyne* v. *John S. Tilley Co., Inc.*, —— Mass. ——, 331 N.E. 2d 541 (1975); *Tibbets* v. *Ford Motor Co.*, —— Mass. App. ——, 358 N.E. 2d 460 (1976).[1]

The trial court then applied the *Woodward* criteria and selected Rhode Island law. We now review the in-depth analysis by the district court of the *Woodward* factors.

(1) It is reasonable to assume that the defendant manufacturer, a Rhode Island corporation, would have purchased insurance commensurate with its potential liability under the Rhode Island strict liability rule. It was foreseeable that the corporation would be placed at risk for its manufacture of products and, as a corporation doing business in Rhode Island, would reasonably guide its actions by the liability imposed under Rhode Island law. Thus, its expectations would not be unfairly overturned by application of the Rhode Island strict liability rule. It is highly unlikely that the defendant would manufacture one set of machinery designed for use in Rhode Island and those states subscribing to strict liability and another separate set destined for states such as Massachusetts where strict liability has not yet been adopted. Predictability of result suggests the appropriateness of applying the Rhode Island rule.

[1]Defendant urges on appeal that the court erroneously selected Rhode Island's pure comparative negligence over the Massachusetts rule which excludes recovery where plaintiff's negligence exceeds that of defendant by even 1%. No charge was given by the court relative to comparative negligence; the case went to the jury without a count based on negligence.

(2) Interstate order is served when application of one state's law offends no law or policy of the other state. *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173, 178 (1st Cir. 1974). Here, Rhode Island has an interest in promoting a high standard of care in the manufacture of goods by Rhode Island corporations. Massachusetts' interest lies in protecting its corporations from excessive liability. Since defendant is not a Massachusetts corporation, it falls without the class the law was presumably designed to protect. *Id.* at 179. To the extent that Massachusetts has an interest in encouraging foreign corporations to do business within the Commonwealth, this interest is not incompatible with enforcing strict product liability since, as noted by plaintiff, defendant continues to do business in Rhode Island notwithstanding that state's adoption of strict liability.[2] Rhode Island's strong interest in holding its corporations to a high degree of responsibility is served by applying its rule to this case. Massachusetts has little interest in the regulation of conduct of a Rhode Island corporation, except to the extent that the conduct injures Massachusetts' citizens or property. This interest is served by adhering to the stricter standard of liability imposed by Rhode Island. Here, the state of manufacture is also the forum state, which has legitimate interests to be served, *see* discussion *infra*. This is not an instance where the sole point of contact is the place of manufacture. *Compare Turcotte* v. *Ford Motor Co., supra,* 494 F.2d at 180 n.9. Rhode Island's choice of law rules lean toward an interest balancing process. The district court properly weighed place of manufacture as one factor in deciding to apply Rhode Island law.

(3) The court felt that the judicial task would be neither

[2] Defendant neither does business regularly in Massachusetts nor employs any people there.

more nor less simplified by application of either state's rule. We cannot find error in this conclusion.

(4) Rhode Island, the forum state, has expressed interest in holding manufacturers of defective products to a standard of strict liability. *Ritter* v. *Narragansett Electric Co., supra,* 283 A.2d at 261-262. It chose this standard in part out of a desire to place upon the shoulders of the manufacturer the costs of injury from its products rather than upon the hapless plaintiff. *Id.* at 262. The manufacturer affirmatively chooses to place its product into commerce; Rhode Island has determined that by so doing it will be held to a high degree of responsibility should that product injure someone. This strong policy of the forum state would be thwarted by applying negligence rather than strict liability.

(5) Rhode Island has stated clearly that it adopted strict liability because it views that rule as the preferable standard to which manufacturers of defective products should be held. *Id.* at 261-263. *See also Turcotte, supra,* 494 F.2d at 180 n.8. Rhode Island's strict liability rule is based on § 402A of the Restatement (Second) of Torts (1965), which explained the rationale behind the rule as follows:

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A, Comment c. The district court properly determined that Rhode Island's strong public policy in favor of strict liability represented that state's view of strict liability as the better rule of law.

A balancing of the above factors permits the conclusion that a Rhode Island state court would have applied its own substantive law with respect to the case in chief on the question of strict liability. The district court sifted the various considerations and so concluded. We find no error.

Third-Party Complaint

Defendant claims that the trial court erred in applying Massachusetts law in the third-party complaint on the question of contribution from the president (Hingorany) of the third-party defendant corporation (AMS) and on the question of noncontractual indemnity[3] from both third-party defendants.

Under both Massachusetts and Rhode Island law, there can be no contribution from the employer, AMS, because

[3] Noncontractual indemnity, unlike contribution, permits one tortfeasor to recover the entire amount of any recovery from the co-tortfeasor. Indemnity can be provided to avoid an unjust result (*e.g.*, where an employer is vicariously liable for the wrongdoing of an employee); where one tortfeasor is primarily liable and the other one secondarily liable; where one party has been merely negligent and the other intentionally or recklessly wrongful; where one tortfeasor has been "passively" negligent and the other "actively" negligent. *See generally* W. Prosser, *Law of Torts* § 51 "Indemnity" at 310-313 (4th ed. 1971); Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U.Pa.L.Rev. 130 (1932).

of the immunity conferred by the workmen's compensation statutes. *Liberty Mutual Insurance Co.* v. *Westerlind*, Mass. Adv. Sh. (1978) 526, 373 N.E. 2d 957, 959 (1978); *Cacchillo* v. *H. Leach Machinery Co.*, 111 R.I. 593, 305 A.2d 541, 543 (1973). There is thus no conflict of laws with respect to this question.

In Rhode Island, an employee has no immunity from suit by a fellow employee for employment related injuries. *Colarusso* v. *Mills*, 99 R.I. 409, 208 A.2d 381, 386 (1965). Massachusetts does confer immunity. *Saharceski* v. *Marcure*, Mass. Adv. Sh. (1977) 1890, 366 N.E. 2d 1245, 1246 (1977). The trial court, faced with this conflict, looked to Rhode Island's conflicts rules. *Klaxon*, *supra*, 313 U.S. at 496. Applying the most significant contacts test, the court held that Massachusetts law applied. The district court found support for its holding in *Busby* v. *Perini Corp.*, 110 R.I. 49, 290 A.2d 210 (1972). While we do not read *Busby* as directly on point as did the court below, we agree that a Rhode Island court would have enforced the immunity. In *Busby*, the Rhode Island Supreme Court applied Massachusetts employer-employee immunity in a case involving an accident in Rhode Island where all involved parties were Massachusetts citizens. The court relied heavily on the policy favoring enforcement of the exclusive remedy clause of a sister state where an employee has received compensation pursuant to that state's laws. *Id.* at 212. The *Busby* court reasoned that the rationale behind many states' workmen's compensation programs was the provision of an exclusive remedy to an injured employee. *See, e.g., Wilson* v. *Faull*, 27 N.J. 105, 141 A.2d 768 (1958). The court summed up by noting that the sounder and better rule of law called for enforcement of a sister state's exclusive remedy provision. *Busby, supra*, at 213. Although *Busby* entailed employer-employee immunity, we think the same reasoning obtains where fellow

employee immunity bars the suit. Here, the employment contract between plaintiff and third-party defendant AMS was entered into and performed in Massachusetts; plaintiff is a Massachusetts resident; AMS, though incorporated in Rhode Island, has its principal and only place of business in Massachusetts; plaintiff received workmen's compensation benefits pursuant to the Massachusetts statute; Massachusetts' exclusive remedy provision forbids suits against fellow employees for employment related injuries. Because of the strong policy of giving effect to sister states' exclusive remedy schemes, enunciated by the Rhode Island Supreme Court in *Busby*, we think the district court properly applied Massachusetts immunity.

Star Chopper raises the peripheral question of whether Ashok Hingorany, a corporate officer, should be allowed to avail himself of fellow employee immunity. The trial court found no Massachusetts case dealing specifically with the question, but reasoned that, since even states which do not recognize fellow employee immunity do grant corporate officers acting within their official capacity immunity, it was proper to assume that Massachusetts, with its more liberal stance toward employment related immunities would similarly immunize third-party defendant Hingorany.[4] Hingorany submitted an affidavit to accompany his motion to dismiss the third-party complaint as to him in which he averred that he was an employee of AMS. This was not contested or contradicted in any pretrial material. The court could, thereupon, accept as uncontroverted Hingorany's statement that he was an employee of AMS and, therefore, entitled to fellow employee immunity.

[4] One commentator has said that, since corporate officers "are treated as co-employees in states that make co-employees liable, it is only logical that they should be treated as co-employees in states that make co-employees immune." 2A Larson's Workmen's Compensation Law § 72.20 at 14-44 (1976).

Star Chopper sought indemnity, both contractual and noncontractual, from the third-party defendants. The district court applied Massachusetts law to the noncontractual indemnity question.[5] The court recognized the broad immunity conferred by the Massachusetts immunity law and concluded that it extended to claims based on noncontractual indemnity as well as contribution.[6] After the district court rendered its decision, the Massachusetts Supreme Judicial Court addressed this specific question and answered it as did the trial court here: any claim for indemnity must rest solely in contract, either implied or express. *Liberty Mut. Ins. Co.* v. *Westerlind,* Mass. Adv. Sh. (1978) 526, 373 N.E. 2d 957, 959 (1978).

The trial court correctly concluded that Massachusetts immunity would not bar the contractual indemnity claims, *see id.* at 959, and applied Rhode Island substantive law to the question of whether an implied contract to indemnity existed. Star Chopper misreads the district court's rulings when it complains that the court did not apply Rhode Island's liberal indemnity law on this question. The court reasoned that the policies underlying strict liability would

[5] It is unclear whether a true conflict exists between Massachusetts and Rhode Island on this question. The Massachusetts rule is that no claim for noncontractual indemnity will lie in an action against an employer. The Rhode Island rule, though not as clearly enunciated, appears to be the same. The Rhode Island Supreme Court has held that, by enacting the workmen's compensation act, the legislature intended to exclude any common law right of action an injured employee might otherwise have against the employer. *Cacchillo* v. *H. Leach Machinery Co., supra,* 305 A.2d at 543; *National India Rubber Co.* v. *Kilroe,* 54 R.I. 333, 173 A. 86, 87 (1934). This proscription would extend as naturally to a claim based on contribution from a joint tortfeasor as to one based on noncontractual indemnity.

[6] "As in the case of contribution, [noncontractual] indemnity is not allowed against one who has a defense, such as . . . immunity, against the original plaintiff." W. Prosser, *Law of Torts* at 313 n.12 (4th ed. 1971) (citation omitted). *See also Newport Air Park, Inc.* v. *United States,* 419 F.2d 342, 347 (1st Cir. 1969).

be best served by retaining in full the liability of the manufacturer for its defective manufacture of a dangerous product, but then permitting it to seek indemnity from the purchaser for failure to add a safety device should the jury find that the purchaser impliedly contracted with the manufacturer to do so. Star Chopper did receive the benefit of Rhode Island's substantive indemnity law on the issue of implied contractual indemnity.

JURY CHARGE

Defendant claims that the court erred in charging the jury on the applicable law. Initially, we acknowledge plaintiff's argument that defendant waived many of its objections by failing to comply with Rule 51 of the Federal Rules of Civil Procedure:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Compliance with this rule has been held to be important to the "orderly and just functioning of the judicial system[.]" *Morris* v. *Travisono,* 528 F.2d 856, 859 (1st Cir. 1976) (citation omitted). *See also IBM* v. *Catamore Enterprises,* 548 F.2d 1065, 1072 n.14 (1st Cir. 1976), *cert. denied,* 431 U.S. 960 (1977). Exceptions to the rule will be made for plain error, *Nimrod* v. *Sylvester,* 369 F.2d 870, 873 (1st Cir. 1966), to prevent a clear miscarriage of justice. *Giacalone* v. *Raytheon Manufacturing Co.,* 222 F.2d 249, 252 (1st Cir. 1955). But we are exceedingly slow to find plain error in civil litigation. *See Martinez Moll* v. *Levitt & Sons,* No. 77-1380, slip op. at 9-10 (1st Cir. Sept. 15, 1978). Defendant, on appeal, lodges several complaints relating to various aspects of the court's rulings on strict liability, including the question of whether it was feasible to place

guards on the machine, whether Star Chopper was under a duty to issue adequate warnings regarding the machine's dangers, and whether the dangers posed by the machine were obvious. Pertinent sections of the judge's charge are excerpted in the margin below.[7]

[7] The court's charge included the following:

> [T]he law considers that a product is in a condition of defectiveness or contains a defect if, upon weighing the ease and feasibility of construction of a safety device against the magnitude of threatened harm in not constructing such a device, it is determined that the latter is of great magnitude and the former is relatively inconsequential.
>
> A manufacturer must give adequate warning of the existing danger, and a product sold without such warning is defective, whenever the manufacturer has reason to anticipate that danger may result from a particular use. The warning must be given in a manner that gives reasonable assurance that the information will reach those whose safety depends upon their hearing it. But a seller is not required to warn where the danger or potentiality for danger is generally known or recognized.
>
> In other words, if you decide that the danger or potentiality of danger is generally known or recognized by those who the defendant could reasonably anticipate would come into contact with the machine, no specific warning was required to be given by the defendant of the danger. But if you decide that the manufacturer defendant did have reason to anticipate the danger and that the danger was not so obvious as to eliminate the manufacturer's responsibility, the failure to give adequate warning may make the machine unreasonably dangerous.

Star Chopper raised certain affirmative defenses on which the court instructed the jury. The court's charge regarding the defense of assumption of the risk was:

> [T]he defendant is saying a dangerous situation existed; that the dangerous situation was obvious or that the plaintiff knew of the dangerous situation; and that with this knowledge, she voluntarily exposed herself to the danger and was injured thereby. Now, ladies and gentlemen, if you find that the defendant has established these facts by a fair preponderance of the evidence, then your verdict must be for Star Chopper. I add this is what we term an affirmative defense and the burden is on the defendant to prove such allegation by the fair preponderance rule. However, in weighing this standard, I instruct you that, "The standard to be applied is a subjective one, of what the particular plaintiff — here we mean Paula Roy — in fact sees, knows, understands and appreciates." If by reason of age, or lack of information, experience, intelligence or judgment, Paula Roy did not understand the risk at the time of the accident, then she did not assume the risk and cannot be denied recovery on this ground.

The court's instruction on the affirmative defense of lack of feasibility stated:

> Star Chopper has raised another defense that you must consider. If it was not feasible at the time of manufacture for Star Chopper to install reasonably effective safety devices, Star Chopper is not liable to Miss Roy. You must be convinced by a preponderance of the evidence that Star Chopper did not know, and a manufacturer of similar machines with reasonable skill would not have known, enough about the functioning of the machine at Advanced Materials' plant to enable the installation of reasonably effective safety devices. . . . You must find that Star Chopper made all reasonable efforts in light of the dangers of the machine to acquire that information. You should also consider whether Star Chopper could have installed reasonably effective devices, not necessarily the most effective devices. To prove that it was not feasible, Star Chopper also must show that there was no all-purpose safety device available and that installation of any available device would make the machine unusable or unsafe for at least one of the purposes Advanced Materials was likely to pursue. . . . Even if Star Chopper had been told or expected that Advanced Materials, Miss Roy's employer, would install safety devices, Star Chopper is nonetheless liable if it could have placed safety devices on the machine. Furthermore, even if it was not feasible for Star Chopper to install safety devices, the machine is still in a defective condition if Star Chopper failed to issue adequate warnings and Star Chopper would still be liable.

[8] Defendant's objection to this portion of the charge was as follows: "I will take exception to the choice of law which the Court selected insofar as Rhode Island and Massachusetts law is concerned . . . ." Defendant did not specify in what manner the court's rulings on strict liability were erroneous.

The objections defendant made following the trial judge's charge to the jury were covered under a blanket exception to the court's reliance on Rhode Island law (presumably the strict liability imposed by Rhode Island, although not even this point is clearly articulated) rather than Massachusetts law.[8] We dealt extensively with the choice of law question above. For our purposes here, we note that this

generalized objection does not sufficiently raise on appeal the issues defendant herein attempts to present. *Morris* v. *Travisono, supra,* 528 F.2d at 859. Nor is this an instance where the clear error exception can be invoked. On the contrary, the court's charge appears to comport with the applicable law, making reliance on the exception inapt.

We now turn to those sections of the jury charge to which Star Chopper did make timely objections and which it alleges were erroneous.

Star Chopper claims that the court should have instructed the jury on comparative negligence, even though the action went to the jury without a negligence count. Comment n to section 402A of the Restatement (Second) of Torts addresses the issue of whether contributory negligence is a defense to a strict liability action and concludes that it is not. The Comment goes on to explain that the defense of assumption of the risk, however, is available. Star Chopper attempts to avail itself of this distinction, suggesting that Rhode Island's comparative negligence law overlaps somewhat with the defense of assumption of the risk. This argument is without merit. The Rhode Island Supreme Court specifically rejected this position,[9] *Kennedy* v. *Providence Hockey Club, Inc.,* 376 A.2d 329, 332-333 (R.I. 1977), adhering to the logical distinction between negligently encountering a risk and knowingly encountering a risk.[10] The district court correctly refused

[9] Star Chopper states in its brief that Rhode Island has defined contributory negligence as overlapping the defense of assumption of the risk, citing *Richard* v. *H.P. Hood & Sons, Inc.,* 243 A.2d 910, 913 (R.I. 1968). That case, to the extent that it stands for the principle that contributory (or comparative) negligence and assumption of the risk are merged, was effectively overruled by *Kennedy* v. *Providence Hockey Club, Inc.,* 376 A.2d 329, 332-333 (R.I. 1977). Since Star Chopper's counsel was counsel in the *Kennedy* case, we cannot understand, in the light of an attorney's duty to state the law correctly, his failure to cite *Kennedy* to us.

[10] The court correctly ruled that the standard to be applied in adjudging the defense of assumption of the risk is a subjective one, *i.e.*, what this particular plaintiff saw, knew, understood, and appreciated. *Kennedy* v. *Providence Hockey Club, Inc.,* 376 A.2d 329, 332 (R.I. 1977); *D'Andrea* v. *Sears, Roebuck & Co.,* 109 R.I. 479, 287 A.2d 629, 633 (1972).

to charge the jury on comparative negligence in light of Rhode Island's law.[11]

Star Chopper objected to the district court's failure to instruct the jury that, as a manufacturer of a component part,[12] it could not be held liable. The law is clear that a manufacturer of a component part can be held liable under strict liability. "There is no dispute that the strict liability applies to the manufacturer of the product, including the maker of a component part. . . ." Prosser, *Law of Torts, supra,* at 664. *See also* 1 Frumer and Friedman, Products Liability § 9.01, at 188.1-189 (1978).

Following the jury charge, Star Chopper objected to the court's use of the phrase "convinced by a fair prepounderance [*sic*] of the evidence" rather than "persuaded" when discussing the burden of proof Star Chopper carried on its affirmative defenses. Before us, it attempts to question the propriety of placing upon Star Chopper the burden of proof at all on these issues. Since this was not objected to at the trial below, *see* discussion *supra,* it is not properly before us. Fed.R.Civ.P. 51. Restricting our review to the court's language, we find no error in the court's phraseology.

[11] For a discussion of the split in authority concerning the applicability of comparative negligence in strict liability cases *see* 2 Frumer and Friedman, Products Liability § 16A[5][g], at 3B-226 — 3B-230 (1978).

[12] There is considerable uncertainty whether Star Chopper correctly characterizes the machine which injured plaintiff as a "component part." Trial testimony suggests that the take-up machine was a self-contained unit, not a component part. However, even under Star Chopper's view of the take-up machine as a component part, strict liability can attach.

OTHER ISSUES

We find neither abuse of discretion nor reversible error in the court's evidentiary rulings, cited by defendant for review by us. Briefly, we see no abuse of discretion in the following: admitting projections of plaintiff's loss of future earning power; refusing to admit evidence of post-accident repairs to the machine, Fed.R.Evid. 407; permitting extensive cross-examination of witness Cabassa concerning the whereabouts of long-absent blueprints, *Hobart* v. *O'Brien*, 243 F.2d 735, 743 (1st Cir.), *cert. denied*, 355 U.S. 830 (1957); *see also United States* v. *Hathaway*, 534 F.2d 386, 401 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); refusing to admit statement of a deceased witness where requisites of Rhode Island's Deadman's Statute were not met, G.L.R.I. 1956 (1969 Reenactment) § 9-19-11.

We do not find persuasive defendant's allegation that the trial court should be reversed for refusing to join as an indispensable party the plaintiff's workmen's compensation insurance carrier as the real party in interest. *See* Fed.R.Civ.P. 17(a) and 19(a), (b). Plaintiff entered into an agreement with the insurance carrier to reimburse the carrier out of any possible recovery for amounts paid pursuant to the workmen's compensation program and the insurance carrier expressly waived its right to sue defendant. There is, therefore, no danger that defendant will be subjected to "double, multiple, or otherwise inconsistent obligations," Fed.R.Civ. P. 19(a), by failure to join the carrier as a party plaintiff. *See Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 110 (1968).

Star Chopper argues that the court erred in failing to declare a mistrial or grant a motion for a new trial after plaintiff's attorney adverted to the fact that defendant carried insurance. The reference to insurance was made

during an extensive colloquy concerning the existence of blueprints for the defective machine and was entered while counsel was reading from a pretrial interrogatory.

> And question 67 was, "Does Star Chopper, its attorneys, its insurance carrier or anyone acting in its behalf have or know of any photographs, motion pictures, maps, drawings, diagrams, measurements, surveys or other descriptions concerning either the scene of the accident or the take-up unit as referred to in interrogatory numbered 3406 and if so state (a) its nature, (b) its subject matter, specific subject matter and (c) the date it was made or taken and (d) the name and address of the person making it or taking it and the name of such person's employer, (e) what such item purports to show, illustrate or represent, and (f) name and address of person having custody of such items," and did you not answer under oath "67. The defendant has various photographs which it will produce upon request," was that your answer, sir?

This one reference was adjudged inadvertent by the trial court and not prejudicial. We agree. Following the colloquy quoted above, counsel continued his intensive questioning of the witness as to the blueprints; counsel did not draw attention in any way to the existence of insurance. We do not view a single, unrepeated reference to defendant's insurance carrier, entered inadvertently, in a trial which lasted three weeks, so inherently prejudicial that failure to declare a mistrial constitutes error. *Compare Cochran* v. *Dube*, 114 R.I. 149, 330 A.2d 76 (1975). Star Chopper made the tactical choice of deliberately foregoing a corrective instruction on the issue, though offered the opportunity on at least two occasions by the trial judge. Under these circumstances, we cannot say that defendant was denied a fair trial. *See Romano* v. *Caldarone*, 78 R.I. 107, 79 A.2d 763, 766 (1951).

Defendant asks us to declare the Rhode Island statute, permitting accrual of interest from the date of the cause of action, to be unconstitutional. R.I.G.L. 1956 (1959 Reenactment) § 9-21-10, as amended by P.L. 1977, ch. 10. Star Chopper asserts that the mandatory language of the pre-judgment interest statute, *i.e.*, interest from the date of the cause of action "shall be included," deprives defendant of its property without due process and denies it equal protection of the laws. It argues that a defendant is prejudiced by the mandatory language in those instances where dilatory tactics of the plaintiff have caused delay in going to trial. A federal court should properly apply a forum state's pre-judgment interest statute when sitting in a diversity case. *Massachusetts Benefit Association* v. *Miles*, 137 U.S. 689, 691 (1891); *Moore-McCormack Lines* v. *Amirault*, 202 F.2d 893, 896 (1st Cir. 1953). *See also Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048, 1052 (1st Cir. 1973). The Rhode Island pre-judgment interest statute was enacted to promote the expeditious settlement of claims. *Isserlis* v. *Director of Public Works*, 300 A.2d 273, 274 (R.I. 1973). Star Chopper complains that, since interest runs from the date of the cause of action rather than the date of filing, a defendant stands at the mercy of a plaintiff who may decide to delay filing a claim. This point has been raised and determined adversely to defendant. In *Kastal* v. *Hickory House, Inc.*, 95 R.I. 366, 187 A.2d 262, 264-265 (1963), the Rhode Island Supreme Court construed mandatory language in the pre-judgment interest statute as evincing a legislative purpose to spur defendant to settlement. The court stated that possible prejudice resulting from a dilatory plaintiff was not a reason to render the statute open to alternate construction. "The legislative fiat is explicit and admits of no conditions or reservations. The claim for damages having been duly reduced to judgment the addition of interest is preemptory." *Id.* at

264. The statute at issue in *Kastal* added interest from the date of filing the cause of action; the statute challenged here adds interest from the date of the injury. The same reasoning applies, however. Pre-judgment interest statutes have a long history, dating at least from 1859 in this country, *see Massachusetts Benefit Association* v. *Miles, supra*, 137 U.S. at 691, and have been held to serve the legitimate purpose of making whole an injured party. *See, e.g., Louisville & Nashville R.R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 238-240 (1925); *Louisiana & Arkansas R.R. Co.* v. *Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966). We find no constitutional infirmity in the statute. Interest statutes in Rhode Island apply to all verdicts rendered after their enactment. *Foster* v. *Quigley*, 94 R.I. 217, 179 A.2d 494, 495 (1962). The Rhode Island statute at issue here became effective March 21, 1977; the verdict was rendered on October 6, 1977. The district court correctly allowed interest to run from the date the cause of action accrued.

Star Chopper's allegations that the verdict was incomplete and that it was coerced do not withstand analysis. The jury returned a verdict in favor of the plaintiff on the issue of strict liability; it left unanswered the court's interrogatory on the warranty claim. This does not render the verdict incomplete since plaintiff thereupon withdrew the warranty count. The court had instructed the jury that plaintiff could recover on either the strict liability count or the warranty count and the jury clearly found for her on the strict liability claim. There is no fatal inconsistency between permitting a recovery under strict liability and failing to render a verdict on the warranty count. *See Kissell* v. *Westinghouse Electric Corp., Elevator Div.*, 367 F.2d 375, 376 (1st Cir. 1966).

Star Chopper claims that the hesitation of juror Carnevale indicates that the verdict was coerced. The court polled

the jury with respect to the third-party claim. When juror Carnevale was asked whether it was her verdict that judgment should be for third-party defendant AMS, the following colloquy took place:

> The Clerk: Mrs. Carnevale —
>
> Juror Carnevale: Could I ask, I need help, I think. I'd like to ask someone a question, I don't know who to ask.
>
> The Court: That's not the point, Madam; the point is this is your verdict sheet. The question is when you voted, "Do you find for Star Chopper Company, Inc. or Advanced Materials System, Inc.?" all right —
>
> Juror Carnevale: Advanced Materials Systems.
>
> The Court: Is that clear enough to you?
>
> Juror Carnevale: Yes, your Honor.
>
> The Court: All right.
>
> The Clerk: Do you find for Star Chopper Company, Inc. or Advanced Materials Systems, Inc.?
>
> Juror Carnevale: Advanced Materials Systems.

The trial judge handled the matter properly. It is the court's function to determine solely whether the verdict represents the juror's position; the court should not inquire into the reasoning process or motivation behind the verdict. *See Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028, 1031-1033 (2d Cir. 1971); *United States* v. *Grieco*, 261 F.2d 414, 415-416 (2d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). The day following the return of the verdict, a conference was held among Juror Carnevale, counsel, and the district judge. Juror Carnevale then explained that she had not wanted to grant a verdict in favor of AMS, but that the other jurors had convinced her that the law favored a verdict for AMS. She, therefore, returned a verdict for AMS because the jurors had convinced her that "you have to go by the law, not what you feel." This falls far

short of a showing of force or coercion by other members of the jury. The rule that a juror will not be heard to impeach his own verdict was aptly applied by the district court here. *McDonald* v. *Pless*, 238 U.S. 264, 269 (1914). No impropriety has been alleged such as to warrant the setting aside of the verdict. "The verdict can stand if all of the jurors concur in it even though one or more may have done so reluctantly only out of deference to the views of the others and to avoid a hung jury." 9 Wright and Miller, Federal Practice and Procedure § 2504 at 491 (1971).

Proceeding to another of defendant's claims, we hold that the court properly granted in part third-party defendants' motion for summary judgment. As discussed *supra* in the section of this opinion dealing with choice of law, the court correctly ruled that, under Massachusetts law, neither third-party defendant could be held liable for contribution or noncontractual indemnity to Star Chopper. The court, having concluded this, properly granted summary judgment on those issues in favor of third-party defendants.

Defendant has not met the burden for a showing that the court abused its discretion in failing to grant a new trial. Defendant's arguments incorrectly perceive the law of strict liability and otherwise fail to show any trial error sufficient to require us to override the district court's refusal to grant a new trial. We have considered all other points raised before us by Star Chopper and find no merit in any of them.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1567.

PAULA H. ROY,
PLAINTIFF, APPELLEE,

v.

STAR CHOPPER COMPANY, INC.,
DEFENDANT & THIRD PARTY PLAINTIFF, APPELLANT.

v.

ASHOK HINGORANY, ETC.,
THIRD PARTY DEFENDANT, APPELLEE.

Judgment

Entered October 3, 1978

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

DANA H. GALLUP,
Clerk.

Transcript of Chambers Conference.

[1] FRIDAY, OCTOBER 7, 1977.

(CHAMBERS)

THE COURT: Good morning, Mrs. Carnevale.

MRS. CARNEVALE: What did I do wrong.

THE COURT: I just want to clarify something. You didn't do anything wrong. You have been such a fine juror. Every one in that jury box was so patient and attentive. I just called you in here to clarify something; to make sure that the jury verdict that was reported last night truly represented the individual votes of each juror in keeping with their own convictions and their own assessment of the facts and the application of the law. In other words, that they followed my instructions.

It has come to my attention that you were emotionally upset last night and that a statement was made to me that you had stated that you were coerced in voting in favor of Advanced Material Systems. I thought if that is so I want you to understand no one can coerce you to do anything. Certainly you should listen to your fellow jurors; certainly you should discuss it with your fellow jurors, certainly you should weigh their points of law, but in the last analysis it must be your vote that is reflected in the ultimate determination as to how the case shall be resolved. As I said in my instructions no juror has to give up their conviction simply because a majority holds to the contrary.

It concerned me when I heard this and I thought, well, I better speak with Mrs. Carnevale —

[2] MRS. CARNEVALE: I'm glad you did.

THE COURT: To find out if that is true. Because if that does not reflect her vote for Advance Material Systems I think I ought to know.

MRS. CARNEVALE: Here I go again.

THE COURT: Well, don't cry. It's foolish for you to cry.

MRS. CARNEVALE: I know, but it just comes out. I can't help it. I feel I was wrong.

THE COURT: First let us look at it in its entirety; there were two cases. Now, as I understand it as far as the case of Paula Roy v. Star Chopper you had no problem with that and you agreed to that.

MRS. CARNEVALE: Yes.

THE COURT: As far as the case of Star Chopper v. Advanced Materials Systems, that was the case that bothered you very much.

MRS. CARNEVALE: Yes. I thought it odd that you should ask.

THE COURT: Now, that is the fourth question.

MRS. CARNEVALE: The fourth question bothered me.

THE COURT: Okay. Is what I state correct?

MRS. CARNEVALE: Yes.

THE COURT: So that the only thing that bothers you is the fourth question.

MRS. CARNEVALE: And I thought it odd that you should ask us all. Why did you ask us?

[3] THE COURT: Well, I don't ask a jury why they voted —

MRS. CARNEVALE: I'm sorry, I mean, I thought it odd why you —

THE COURT: But now this has come to my attention and you are here with me now and it is being recorded — the Clerk of court is here — so tell me; what is it that you want to say to me — that does not reflect your true vote, is that what you want to say?

MRS. CARNEVALE: Yes, sir, I feel that it wasn't what I felt, what I believe in. It wasn't right. We argued about it for a long time. I was the only one who felt that way. There were

five who didn't and then they talked, they talked me into it. They made me understand that's the law, it isn't how you feel, it's the law that counts.

THE COURT: Which of course is right.

MRS. CARNEVALE: And I felt, well, they are right and that's why I voted. When I sat in that jury last night I was not ashamed, but I felt I did wrong by saying Star Chopper was wrong. I felt Star Chopper wasn't wrong. This is what I believe in, I still believe in and I will always believe in. I went home unhappy.

THE COURT: You mean that you felt that —

MRS. CARNEVALE: From the evidence that I heard —

THE COURT: See if what I say is correct. You felt then that the 348,000, was that the amount?

MR. DECESARIS: Yes, Your Honor.

[4] THE COURT: Which was assessed against Star Chopper as a judgment, that Star Chopper had a right to its claim against Advanced Materials Systems, is that correct?

MRS. CARNEVALE: That's correct.

THE COURT: And that Advanced Materials Systems should have been found wrong as against Star Chopper?

MRS. CARNEVALE: Yes.

THE COURT: Okay.

MRS. CARNEVALE: I believe it, I feel it, I believe it. From the evidence but I thought because five were against me —

THE COURT: You believed it from the evidence. Do you mean by that —

MRS. CARNEVALE: I thought, well, may I didn't understand.

THE COURT: Do you mean that you believed — I don't know whether I should question you.

MRS. CARNEVALE: Do you want me to tell you how I feel? That Mr. Hingorany asked Mr. Cabassa to draw the specifications and from the specifications he did it on the orders of Mr.

Hingorany. There was nothing about guards, were there, in those specifications?

THE COURT: I can't talk to you about that.

MRS. CARNEVALE: This is — I feel that Mr. Hingorany and AMS was the blame; that Mr. Letoile designed the machine from the specifications and that they were innocent. This is how I feel. Maybe I'm wrong. After they told me that the law is that the guards, you have to have signs on the machines.

[5] THE COURT: All right, Mrs. Carnevale, now, I don't want you to be concerned about what you tell me. You are doing your job as a juror.

MRS. CARNEVALE: I'm glad you called me in. Maybe you can clear it up in my mind that what I did was right and I can go home and feel okay.

THE COURT: I want you to go home and feel okay because jury service is a thing of conscience and I don't want any one being concerned about how they voted if they did what their conscience told them they were supposed to do in keeping with the evidence and in keeping with the law. Now, if they voted differently from that because they were coerced, as you say, it is proper that the Court should know about it. All I want to know from you is if it is true that the vote that you gave for Advance Materials Systems was a vote that was forced upon you by the other jurors.

MRS. CARNEVALE: When you say "forced" they didn't have gun in my back.

THE COURT: Well, I know.

MRS. CARNEVALE: I mean, they made me feel, well, the law, you have to go by the law, not what you feel. I mean, this is how they put it — "You feel sorry for the company" "No, I don't". I'm going by the specifications and I feel Mr. Hingorany was at fault, AMS was at fault. This is what I believe and I will always believe it.

THE COURT: Well, then why did you vote for AMS?

[6] MRS. CARNEVALE: Because they are five against one and I thought, well, maybe they are right, maybe I'm wrong, maybe I misunderstood. Maybe I misunderstod the law, it's so tricky. I don't know. Maybe I heard too much testimony. I don't know. I was confused.

THE COURT: Is that the reason why you voted?

MRS. CARNEVALE: I think so.

THE COURT: Okay, don't worry about it.

MRS. CARNEVALE: It's stupid to do all this.

THE COURT: Now, please, Mrs. Carnevale, it is not stupid. You are a juror.

MRS. CARNEVALE: Thank You.

(Conclusion of Chambers conference)

I hereby certify that the foregoing is true and accurate transcript of the Chambers conference on Friday morning, October 7, 1977, according to my stenographic notes.

/s/ LOUIS V. SPERTINI

Supreme Court, U. S.
FILED
FEB 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1037

STAR CHOPPER COMPANY, INC.,
PETITIONER,

v.

PAULA H. ROY, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT PAULA H. ROY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT PAULA H. ROY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Paula H. Roy (plaintiff below) respectfully submits that the petition for a writ of certiorari (cited herein as "Pet.") should be denied. Respondent Roy concurs in the petitioner's statements under the headings *Opinions Below, Jurisdiction* and *Constitutional Provisions Involved* (although respondent submits that no constitutional issue is in fact presented). The appendix to the petition ("Pet. App.") is incorporated herein by reference.

Questions Presented

1. Did the trial judge err in his conduct of the polling of the jury?

2. Did the trial judge err in his choice of the applicable law?

Statement of the Case

This is a products liability case. Jurisdiction of the district court was founded upon diversity of citizenship. The plaintiff, Paula H. Roy, was severely injured when her left hand was caught and crushed in a set of pinch rollers manufactured by the defendant, Star Chopper Company, Inc. This injury occurred in the course of plaintiff's employment with third-party defendant Advanced Materials Systems, Inc. (AMS).

The jury found that the defendant's machine was defective and returned a verdict of $348,000 for plaintiff on the strict liability count. On the defendant's third-party claim for implied contractual indemnity against AMS, the jury returned a verdict in favor of AMS. The jury was polled *only* on its verdict in the third-party action, not on its verdict in the plaintiff's case against the defendant. The judgment of the district court entered upon the verdict was unanimously affirmed by the court of appeals.

Reasons Why the Writ Should Not Be Granted

I. This Is an Ordinary Diversity Tort Case, Presenting No Issues of Sufficient Importance To Justify Review in This Court.

The petition is devoid of even colorable reasons for granting the writ. The questions presented deal with matters of the most mundane kind: the manner of polling a jury and the choice of the applicable law. These are manifestly not the kinds of questions that command the attention of this Court. There is no split of opinion among the circuits on these questions; nor do they involve the construction of any federal statute or rule. The jury-polling question does not even raise a constitutional issue, being merely a matter of trial court housekeeping; and although petitioner purports to raise a constitutional issue under the choice-of-law question, it does not cite a single case holding, or even suggesting, that there is a due process problem in applying the law of more than one state to different issues in the same case. The petition clearly should be denied for lack of importance of the issues presented.

II. The Trial Court Properly Conducted the Polling of the Jury on Its Verdict in the Third-party Action.

The petition at pages 5-6 fails to set forth the polling of Juror Carnevale in its entirety. The complete colloquy is as follows (Opinion of the First Circuit, Pet. App. at 20a):

> THE CLERK: Mrs. Carnevale—
>
> JUROR CARNEVALE: Could I ask, I need help, I think. I'd like to ask someone a question, I don't know who to ask.
>
> THE COURT: That's not the point, Madam; the point is this is your verdict sheet. The question is when you voted, "Do you find for Star Chopper Company, Inc. or Advanced Materials System, Inc.?" all right—
>
> JUROR CARNEVALE: Advanced Materials Systems.
>
> THE COURT: Is that clear enough to you?
>
> JUROR CARNEVALE: Yes, your Honor.
>
> THE COURT: All right.
>
> THE CLERK: Do you find for Star Chopper Company, Inc. or Advanced Materials Systems, Inc.?
>
> JUROR CARNEVALE: Advanced Materials Systems.

The trial judge handled the matter properly. There was not the slightest suggestion that Juror Carnevale dissented from the verdict. When a juror appears hesitant, nervous, or confused, the trial court's function is solely to ascertain what the juror's verdict is. *Eulo* v. *Deval Aerodynamics, Inc.*, 47 F.R.D. 35, 51 (E.D. Pa. 1969), *modified on other grounds*, 430 F.2d 325 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). The object of the jury poll is to determine whether each individual juror agrees with the verdict, not to determine how the jury arrived at that verdict. *See, e.g., Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971); *Dixon Stave & Heading Co.* v. *Archer*, 40 Tenn. App. 327, 291 S.W.2d 603 (1956). The court of appeals disposed of petitioner's argument on this point in two sentences (Pet. App. at 20a).

III. There Is No Evidence That the Verdict of Juror Carnevale Was Coerced.

Under the heading of *Questions Presented*, petitioner makes the astonishing assertion that "the record reveals that the juror was coerced in the jury room." (Pet. at 2.) In fact, the transcript of Juror Carnevale's subsequent conversation with the trial judge in his chambers clearly shows that the only "coercion" to which she was subjected consisted of arguments by the other jurors that they were right and she was wrong. Out of sympathy for petitioner, Juror Carnevale had wanted to vote for petitioner against respondent AMS; but the other jurors convinced her that the law required a verdict in favor of AMS. In her own words:

> We argued about it for a long time. I was the only one who felt that way. They were five who didn't and then they talked, they talked me into it. They made me understand that's the law, it isn't how you feel, it's the law that counts.
>
> THE COURT: Which of course is right.
>
> MRS. CARNEVALE: And I felt, well, they were right and that's why I voted. [Pet. App. at 24a-25a.]
>
> * * *
>
> MRS. CARNEVALE: When you say "forced" they didn't have gun in my back.
>
> THE COURT: Well, I know.
>
> MRS. CARNEVALE: I mean, they made me feel, well, the law, you have to go by the law, not what you feel. [Pet. App. at 26a.]

As the court of appeals stated, "[t]his falls far short of a showing of force or coercion by other members of the jury." (Pet. App. at 20a-21a.) The fact that a juror may have concurred in the verdict "reluctantly only out of deference to the views of the others and to avoid a hung jury" does not affect the validity of the verdict. 9 C. Wright & A. Miller, *Federal Practice & Procedure*, §2504, at 491 (1971).

Furthermore, petitioner's argument that the verdict was coerced belies its subsequent assertion that "[t]his is not a case of a juror impeaching her own verdict" (Pet. at 5). That is exactly what this is. There is not a shred of evidence in the record of the jury poll that Juror Carnevale was coerced; the only evidence of purported "coercion" is in her unsworn statement to the trial judge the next morning. But that statement is clearly not admissible to impeach the verdict, Fed. R. Evid. 606(b), as both the trial court and the court of appeals properly held (Pet. App. at 21a). The dangers of receiving such evidence have been too well and too often stated to need repetition here. *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915); Advisory Committee Note to Fed. R. Evid. 606(b); 3 J. Weinstein &

M. Berger, *Weinstein's Evidence* ¶ 606[03], at 606-25 (1978).

IV. The Court Below Properly Chose the Applicable Law, and No Constitutional Rights of Petitioner Were Violated Thereby.

Petitioner complains because the trial court applied the Rhode Island law of strict liability to the case in chief and the Massachusetts law of indemnity to the third-party claim. It argues that this procedure somehow violated its due process rights. The argument is without merit.

In the first place, petitioner misstates the procedural history of the case. Its whole argument is based on the premise that "[i]n order to hold the defendant liable, Rhode Island's law of strict liability had to be . . . applied" because "Massachusetts does not recognize strict liability and there was no finding by the jury that the defendant was negligent. . . ." (Pet. at 10.) Petitioner neglects to mention the fact that respondent Roy voluntarily dropped her negligence count before the case went to the jury when the trial judge ruled that he would apply Rhode Island's law of strict liability to the case in chief. This was a tactical choice based upon the trial judge's ruling. Had the trial judge applied Massachusetts law to the case in chief, respondent Roy would not have dropped the negligence count; there would most probably still have been a verdict for respondent Roy in the case in chief (the evidence of negligence was overwhelming); and there would certainly still have been a verdict against petitioner on its third-party claim against respondent AMS. Petitioner's faulty premise vitiates its entire argument on this issue.

More fundamentally, however, petitioner's argument simply fails to present a substantial federal question. The courts below properly applied Rhode Island's choice of law

rules, as they were bound to do under *Klaxon Co.* v. *Stentor Manufacturing Co.*, 313 U.S. 482 (1941). Rhode Island has adopted the modern interest-balancing approach to choice of law, which "dissects an action into various elements, *and governs each individual element or issue by the law of the jurisdiction which has the most significant contacts relative thereto.*" *Woodward* v. *Stewart*, 104 R.I. 290, 293, 243 A.2d 917, 919-20 (1968) (footnote omitted) (emphasis added). As the detailed analysis given in the opinion of the court of appeals clearly shows, the interest-balancing criteria set forth in *Woodward* plainly mandate the application of different law to the third-party claim than to the case in chief. (Pet. App. at 3a-11a).

It is commonplace under modern choice-of-law rules for the law of different states to be applied to different issues in the same case. *E.g.*, *Brown* v. *Church of the Holy Name of Jesus*, 105 R.I. 322, 331 & n.10, 252 A.2d 176, 181 & n.10 (1969); *Woodward* v. *Stewart*, *supra*, 104 R.I. at 300-01, 243 A.2d at 923-24. This respondent is not aware of any case that has ever suggested that this procedure violates due process; and petitioner cites none. It is conceivable that a state might have so little contact with a case that application of its law would be constitutionally impermissible; but this is hardly such a case. Massachusetts had all the significant contacts with the employment relationship upon which petitioner's claim for noncontractual indemnity was based (Pet. App. at 9a), and the application of Massachusetts law to bar that claim was entirely proper.

V. Even if Certiorari Is Granted, Plaintiff Paula H. Roy Is Not Properly Brought in as a Party Respondent.

Petitioner's arguments in this Court involve only the third-party claim and not the case in chief. This is clear on the face of the record.

Respondent never requested that the jury be polled on its verdict in the case of *Paula H. Roy* v. *Star Chopper Company, Inc.* After the verdict was returned, the judge read the answers written on the verdict sheet and asked the members of the jury whether each of them so found. All of the jurors responded "yes." The court then asked defense counsel if he wished to have the jury polled. He replied:

> MR. LaFAZIA: On the third question, yes, your honor—excuse me. I guess it's the fourth question.
> THE COURT: You mean Star Chopper versus Advanced Materials Systems?
> MR. LaFAZIA: Yes, your Honor.[1]

The court then proceeded to poll the jury *only* on the verdict in the third-party action. Thus, nothing which transpired between Juror Carnevale and the court reflected any doubt on the verdict on behalf of respondent Paula Roy or the amount of that verdict.

The conference the next day between the judge and Mrs. Carnevale further emphasizes the unanimity of the jury with regard to the verdict on behalf of Paula Roy (Pet. App. at 24a.)

> THE COURT: First, let us look at the case in its entirety; there were two cases. Now, as I understand it as far as the case of Paula Roy v. Star Chopper you had no problem with that and you agreed to that.
> MRS. CARNEVALE: Yes.
> THE COURT: As far as the case of Star Chopper v. Advanced Materials Systems, that was the case that bothered you very much.
> MRS. CARNEVALE: Yes. I thought it odd that you should ask.

[1] This colloquy is taken from the transcript of the jury's report of its verdict on October 6, 1977, which was printed at pages 182A-182C of the Record Appendix in the court of appeals.

> THE COURT: Now, that is the fourth question.
> MRS. CARNEVALE: The fourth question bothered me.
> THE COURT: Okay. Is what I state correct?
> MRS. CARNEVALE: Yes.
> THE COURT: So that the only thing that bothers you is the fourth question.
> MRS. CARNEVALE: And I thought it odd that you should ask us all. Why did you ask us?

It is thus evident that the jury was clear and unanimous in its verdict in favor of respondent Paula Roy against petitioner Star Chopper Company. Consequently, the error complained of by petitioner in this Court concerning the polling of the jury cannot affect the validity of that verdict.

With respect to the choice of law issue, petitioner clearly does not argue that the courts below erred (constitutionally or otherwise) in applying Rhode Island's law of strict liability to the case in chief. Rather, petitioner argues that, because Rhode Island law was applied to the main case, petitioner was constitutionally entitled to have Rhode Island law applied to the third-party claim as well. (Pet. at 9-11). This argument cannot have any effect on the verdict and judgment in favor of respondent Roy; a reversal on this ground would only mean that the third-party claim would be retried under Rhode Island law.

Accordingly, if this Court should determine to grant certiorari, respondent Roy respectfully requests the Court to enter an order dismissing her as a party respondent and expressly stating that the verdict and judgment in the main case are not affected by the grant of certiorari.

Conclusion

This is an ordinary diversity tort case. It was fairly tried before an able and experienced trial judge. The judgment of the district court entered upon the jury's verdict was unanimously affirmed by the court of appeals. No error was committed by either of the courts below. The issues raised in the petition are manifestly not of sufficient importance to justify review in this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1037

STAR CHOPPER COMPANY, INC.,
PETITIONERS,

v.

PAULA H. ROY,
ADVANCED MATERIALS SYSTEMS, INC.,
and ASHOK HINGORANY,
RESPONDENTS.

BRIEF FOR RESPONDENTS ADVANCED MATERIALS SYSTEMS, INC. AND ASHOK HINGORANY IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENTS.

BRIEF FOR RESPONDENTS ADVANCED MATERIALS SYSTEMS, INC. AND ASHOK HINGORANY IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The Opinion of the Court of Appeals for the First Circuit (Pet. App. 1a-21a) is reported at 584 F.2d 1124. The Opinion of the District Court as to certain issues is reported at 442 F. Supp. 1010.

Questions Presented

I. Whether the trial justice properly required each juror to state his or her verdict upon the poll of the jury?

II. Whether an unsworn statement of a juror may be used to impeach the verdict of the jury?

III. Whether the trial justice was correct in applying the choice of law rule of the forum state to the separate issues of the two actions?

Statement of the Case

Respondent Paula A. Roy, a Massachusetts resident, was employed in the Commonwealth of Massachusetts by respondent Advanced Materials Systems, Inc. (AMS), a Rhode Island corporation, having its sole place of business in Massachusetts. Respondent Ashok Hingorany was similarly a Massachusetts resident and employee of AMS. While in the course of her employment, respondent Roy was injured by a machine which had been manufactured by petitioner, Star Chopper Company, Inc., a Rhode Island corporation, having its sole place of business in Rhode Island. Hingorany had negotiated on behalf of AMS for the purchase of the machine and had certain responsibilities for its set up and operation at the AMS place of business.

Miss Roy sued petitioner for damages on theories of negligence, breach of warranty and strict products liability. Petitioner thereafter brought a third-party action against respondent Hingorany seeking contribution or indemnity for any damages awarded against it and against respondent AMS seeking indemnity. Prior to the presentation of evidence to the jury, the trial justice granted, in part, a motion for summary judgment on behalf of respondents

Hingorany and AMS on the question of contribution[1] and reserved judgment on the motion with respect to the issue of indemnity. The motion was eventually denied with respect to that question. However, prior to the submission of the case to the jury, a directed verdict was granted in favor of respondent Hingorany.

The case eventually went to the jury on respondent Roy's claims of breach of warranty and strict products liability and on petitioner's claim against respondent AMS for indemnity. The jury returned verdicts for respondent Roy on the strict products liability claim and for respondent AMS on the third-party indemnity claim. During the polling of the jury on the verdict in the third-party case, one of the jurors was hesitant in announcing her verdict. After a brief comment by the trial justice, she unqualifiedly responded to the Clerk that her verdict was for AMS.

On appeal to the Court of Appeals for the First Circuit, the judgment of the district court was affirmed.

Argument

The instant petition fails to set forth any of the reasons usually considered by this court for review of cases on writ of certiorari. There is no conflict among the circuits as to any issue raised, no decision of a court of appeals on an important question of state law in conflict with applicable state law, no decision on an important question of federal law which should be settled by this court, no decision on a federal question in conflict with an applicable decision of this court nor any departure from the accepted and usual course of judicial proceedings or sanction thereof by a lower court as to call for an exercise of this court's

[1] Although the third-party complaint did not specifically demand contribution from AMS, the lack of specific factual allegations apparently caused the court and the parties to treat it as if it had.

power of supervision. Sup. Ct. R. 19(1). Even if it be assumed that the acts alleged by petitioner were error, the errors do not rise to the level of those ordinarily considered by this court on certiorari. In any event, certiorari should not be granted, since there was no error below.

I. The Jury Was Properly Polled

After the announcement of the verdict for respondent Advanced Material Systems, Inc. in the third-party action, the jury was polled on their individual verdicts. During the polling, one of the jurors expressed some hesitation in announcing her verdict.

> The Clerk: Mrs. Carnevale—
> Juror Carnevale: Could I ask, I need help, I think. I'd like to ask someone a question, I don't know who to ask.
> The Court: That's not the point, Madam; the point is this is your verdict sheet. The question is when you voted, "Do you find for Star Chopper Company, Inc. or Advanced Material Systems, Inc.?" all right—
> Juror Carnevale: Advanced Material Systems.
> The Court: Is that clear enough to you?
> Juror Carnevale: Yes, your honor.
> The Court: All right.
> The Clerk: Do you find for Star Chopper Company, Inc. or Advanced Material Systems, Inc.?
> Juror Carnevale: Advanced Material Systems.

In responding to the inquiry of the Clerk, Juror Carnevale was clearly expressing a present statement of her verdict. By conveniently omitting this portion of the colloquy, petitioner has attempted to make it appear otherwise. Petition, pp. 6-7. While the juror's statement can hardly be considered as an indication of dissent, the trial judge properly performed his duty.

> . . . If on the poll of the jury it *appears* that a juror dissents, the judge may interrogate such juror for the purpose of ascertaining [her] true position. But once the position is ascertained it 'is both unwise and undesirable that the court should enter into an argument with the juror or require an explanation of [her] change of position. . . .' 5A J. Moore, *Federal Practice*, ¶49.07, p. 2239 (1977) (emphasis added) (footnotes omitted).

See also *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028, 1031-1033 (2d Cir. 1971); *United States* v. *Greico*, 261 F.2d 414, 415-416 (2d Cir. 1958), *cert. denied*, 359 U.S. 907, 79 S. Ct. 582, 3 L. Ed. 2d 572 (1959). The jury verdict was, therefore, properly received and entered.

II. A Juror's Verdict May Not Be Impeached by Her Own Unsworn Statement

The day following the verdict, Juror Carnevale was interviewed by the trial judge due to information which he had received. (Pet. App. 23a-27a)[2] Examination of her statements indicates that she was convinced by the other jurors that the law was such that the verdict in the third-party action should properly be for the third-party defendant. There does not appear to be even an intimation of any improper conduct on the part of any of the jurors. Even if the statement might conceivably be considered to impeach the jury's verdict, this court has held squarely that significant policy reasons require that such an action not be permitted.

---

[2] It is noted that the statements made by Juror Carnevale to the trial judge were not made under oath and should, therefore, not be considered as part of the record. However, as is shown, even if made under oath, the statements would not be competent to impeach the verdict.

> . . . [T]he weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.
>
> These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendants ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference. *McDonald* v. *Pless*, 238 U.S. 264, 267-268, 35 S. Ct. 783, 784, 59 L.Ed. 1300, 1302 (1915).

This rationale is currently reflected in Rule 606(b) of the Federal Rules of Evidence:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Thus, the statements of Juror Carnevale, even if considered to be testimony or an affidavit, may not be considered as a basis for impeaching the verdict. Certainly the supervisory power of this court should not be invoked to review an action of the trial judge, as approved by the Court of Appeals, which was, on its face, in compliance with well settled law. Even if it were necessary to examine the substantive allegations of the juror, the comments of Chief Judge Lumbard in his concurring opinion in *Grace Lines, Inc.* v. *Motley, supra*, most appropriately summarize the issue:

> In this case there was no basis for the district judge to find that the one juror did not in fact agree at the time the verdict was rendered. The juror never said

that it was not her verdict. On the contrary it was implicit in her statement that she gave up her views and that she did in fact ultimately agree so that the verdict would be unanimous. Under our system this was a good and proper reason, and it merits no further cross-examination either by the court or by anyone else. 439 F.2d at 1034. (footnotes omitted).

III. The Proper Law Was Applied in the Third-Party Action

There can be no dispute that the district court in a diversity matter must apply the sustantive law of the forum state, including its conflict of laws rules. *Klaxon Co.* v. *Stentnor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). The trial judge recognized this obligation. *Roy* v. *Star Chopper Co., Inc.*, 442 F.2d 1010, 1013 (D.R.I. 1977). Rhode Island law requires the application of the "interest-weighing approach" in conflicts cases. *Woodward* v. *Stewart*, 104 R.I. 290, 243 A. 2d 917 (1968). Under this approach, the substantive law of different jurisdictions may be applied to different issues in the same case, depending upon which state has the most significant interest with respect to that issue. *Brown* v. *Church of the Holy Name of Jesus*, 105 R.I. 322, 331, 252 A. 2d 176, 181 (1969). The Rhode Island Supreme Court has decided that it will enforce the immunity provisions of the Massachusetts workmen's compensation statute where compensation is paid under that statute even though the tort was committed in Rhode Island. *Busby* v. *Perini Corp.*, 110 R.I. 49, 290 A. 2d 210 (1972). Of course, in the present matter, contribution from respondent Hingorany would have to have been based on conduct occurring in Massachusetts, thus making an even stronger case for applying the substantive law of Massachusetts by a Rhode Island court. The trial

court and the Court of Appeals applied well settled Rhode Island conflicts law in sustaining the Massachusetts created immunity from contribution of respondent Hingorany.

Petitioner's due process argument fails to comprehend that the benefit of the Massachusetts immunity was required as a matter of Rhode Island law. The due process claim is, therefore, illusory. Petitioner cites no authority which would give substance to its argument or make the issue worthy of consideration by this court.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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